No. 16040

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

ALBERT S. CRAIG, *et al.*,

Appellants,

vs.

FAR WEST ENGINEERING COMPANY, INC., a corporation,

Appellee.

FAR WEST ENGINEERING COMPANY, INC., a corporation,

Appellant,

vs.

ALBERT S. CRAIG, *et al.*,

Appellees.

Answering Brief of Plaintiffs Appellees-Appellants.

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ARGUMENT.

1. The Work Here Involved Is Clearly Interstate Commerce.

That Hughes Aircraft Company is engaged in interstate commerce is admitted [R. 244]. Each of the plaintiffs spent all or a substantial portion of his time at drafting or design work intended for Hughes Aircraft Company. These drafts and designs, for example, were for electronic and electromechanical mobile test equipment to be

sent to Tucson, Arizona, and Holloman Air Force Base, and all over the world for the Air Force to use in checking missiles [*e.g.,* R. 223-224].

Apparently, it is Defendant's contention that drafts and design are not "goods," and that therefore the Fair Labor Standards Act does not come into operation at all, regardless of the fact that interstate commerce is otherwise involved.

"Goods," as defined by Section 3(i) of The Act (29 U. S. C., Sec. 203(i)) means "goods . . ., wares, products, commodities, merchandise, or *articles or subjects of commerce of any character, or any part or ingredient thereof,* . . ." (Italics supplied.) The range and nature of articles which may be considered as "goods" under this sweeping definition is virtually unlimited.

Defendant's counsel, at page 5 of its Opening Brief, cites *Collins v. Ford, Bacon & Davis,* 71 Fed. Supp. 229 (D. C. Pa., 1946), as supporting Defendant's position. The facts in that case were wholly different, however, and that court offers the dictum, precisely applicable to the facts present here, at page 230:

> "Plans, designs and letters by which information is transmitted can be considered 'goods' only when the plans themselves or the information contained in the letters is the thing which the employer sells and his customers buy."

Similarly, Defendant, at page 5 of its Opening Brief, cites *McComb v. Turpin,* 81 Fed. Supp. 86 (D. C. Md., 1948), where the facts again are quite different. And here, too, that court, at page 89, offers the reasoned dictum in support of Plaintiffs on the facts present here, and it quotes the above quoted *Ford, Bacon & Davis* case dictum.

None of the other cases cited by Defendant even remotely bears on the facts present here.

As opposed to Defendant's cited cases, the dictum at page 790 in *Bozant v. Bank of New York,* 156 F. 2d 787 (C. A. 2d N. Y., 1946) is particularly persuasive:

> "In so far as the Bank's business consists of preparing, executing or validating bonds, shares of stock, commercial paper, bills of lading and the like, it is engaged in 'producing goods for commerce'; and included in this are any activities necessary to the effectiveness of the documents even though, as an example, it be no more than registering a share or a series of bonds. On the other hand the mere writing of letters or the drawing of papers, which have no value of their own except as records, are not to be counted."

In any event, Defendant's counsel leads us astray as he attempts to confine argument to the question of "goods." The inquiry into the applicability of The Act is more properly directed to the word "produced," which is defined in Section 3(j) of The Act (29 U. S. C., Sec. 203(j)) as:

> ". . . produced, manufactured, mined, handled, or in any other manner worked on in any State; and for the purposes of this Act an employee shall be deemed to have been engaged in the production of goods if such employee was employed in producing, manufacturing, mining, handling, transporting, or in any other manner working on such goods, or *in and closely related process or occupation directly essential to the production thereof, in any State.*" (Italics supplied.)

The drafts and designs involved here are indisputably a "closely related process or occupation essential to the production" of Hughes Aircraft Company goods, which in turn are admittedly in interstate commerce. Under the provisions of the above subparagraph it is not even a requirement that the drafts and designs ever move across any state lines.

While there is a wealth of authority generally in support of Plaintiffs' position, counsel has found only one case precisely in point. *McComb v. Eimco Corp.,* 83 Fed. Supp. 635 (D. C. Utah, 1949), holds that employees in the engineering department of a manufacturer of filters and mining equipment, engaged in the designing of filters and in the detailing of those designs, were "engaged in the production of goods for interstate commerce and in processes and occupations necessary thereto" (p. 638).

2. Defendant Being in Default at the Time, Plaintiff Gindes Was Not Properly Served With a Subpoena Re Deposition.

The default of Defendant in the Gindes case was properly entered by the Clerk on December 31, 1957 [R. 24]. A Subpoena *re* Deposition was served on Gindes on January 7, 1958 [R. 91]. The default of Defendant was not set aside by the Court until January 13, 1958 [R. 131], and no service of process was thereafter made by Defendant on Gindes.

3. The Court Has Properly Exercised Its Discretion in Denying Defendant's Motions to Dismiss for Failure of Gindes and Linick to Appear for Their Depositions.

On January 28, 1958, the Court denied Defendant's motions to dismiss under Rule 37(d) without prejudice to renewal of the motion at time of trial [R. 120]. On April 4, 1958, the Court denied Defendant's renewed motions made after trial and entry of judgment [R. 122].

Even if there had been some facts properly discoverable from Gindes and Linick, they had good and sufficient reason for being excused from the taking of depositions at the time scheduled, as appears in the Brief in Opposition to Motion to Dismiss and the supporting affidavits [R. 103-108].

Moreover, there was nothing in fact discoverable from Gindes or Linick, considering the basis on which the Court rendered its judgment. Plaintiffs accepted Defendant's payroll records [Deft. Exs. A-J], which set forth the hours worked, the earnings, and the fact that Plaintiffs were each employed and paid at hourly rates. It was never disputed that each of the plaintiffs worked a substantial portion of his time on drafts and designs for Hughes Aircraft Company, which was clearly engaged in interstate commerce. Thus, no evidentiary facts were ever really in issue. The two issues remaining are purely matters of law: (a) whether drafts and designs are "goods" in interstate commerce, and (b) whether Plaintiffs are necessarily covered by the time-and-a-half benefits of the Fair Labor Standards Act because they were paid on an hourly basis.

4. **There Was No Guaranteed Compensation Arrangement Excepting Defendant From Overtime Rate Principles.**

Defendant had no flat salary or fee arrangement with Plaintiffs and thus does not come within the exemptions of Section 13(a) of the Fair Labor Standards Act (29 U. S. C., Sec. 213(a)), as defined by the Administrator in 29 C. F. R., Part 541, Sections 541.100, 541.200, 541.300.

Defendant, at page 19 of its Opening Brief, asserts that there was a guarantee arrangement but at the same time admits that Plaintiffs deny this. The Court has accepted the Plaintiffs' testimony, which, in turn, is further supported by the payroll records [Deft. Exs. A-J]. Moreover, even if there had been a guarantee of, say, forty-five hours weekly to hourly rate employees, this would not convert Plaintiffs into employees on a salary or fee basis.

Rather, the inquiry is to the possible application of Section 7(e) of The Act (29 U. S. C., Sec. 7(e)), which provides:

> "No employer shall be deemed to have violated subsection (a) by employing any employee for a workweek in excess of forty hours if such employee is employed pursuant to a bona fide individual contract, or pursuant to an agreement made as a result of collective bargaining by representatives of employees, if the duties of such employee necessitate irregular hours of work, and the contract or agreement (1) specifies a regular rate of pay of not less than the minimum hourly rate provided in section 6(a) and compensation at not less than one and one-half times such rate for all hours worked in

excess of forty in any workweek, and (2) provides a weekly guaranty of pay for not more than sixty hours based on the rates so specified."

But there is neither such a bona fide individual contract or such a collective bargaining agreement nor, indeed, any testimony relating thereto.

Conclusion.

It is submitted that Plaintiffs are each entitled to an equal amount in liquidated damages, and that Mr. Leetham be required to respond personally to the extent that Defendant may be unable to satisfy the entire amounts of the judgments as they may finally be determined.

Respectfully submitted,

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Attorney for Plaintiffs Appellees-Appellants.